Using Alternative Dispute Resolution to Streamline Superfund

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I. INTRODUCTION

Alternative Dispute Resolution (ADR) commonly is used to strengthen negotiations between conflicting parties. ADR is "a short-hand term for a set of processes which assist parties in resolving their disputes quickly and efficiently."[1] Objective third parties or neutral parties are pivotal to the success of alternative dispute resolution.[2] ADR recently has become a necessary component of the United States Environmental Protection Agency's (EPA's) enforcement program and should be considered for potential use in all cases to streamline enforcement-related disputes.[3]

The enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[4] in 1980 placed the immense burden of implementing a program to identify and clean up uncontrolled hazardous waste sites on the EPA and other Superfund stakeholders.[5] The EPA must create an effective method to investigate a vast number of uncontrolled sites and the incredibly diverse range of problems.[6] Certain aspects of the Superfund program have generated much criticism. Specific complaints have focused on the pace and cost of cleanups, the degree to which sites are cleaned, the fairness of the liability approach to potentially responsible parties (PRPs),[7] the role states play in the process,

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[1] Office of Site Remediation Enforcement, U.S. Envtl. Protection Agency, *Use of Alternative Dispute Resolution in Enforcement Actions*, 26 Env't Rep. (BNA) 301, 301 (May 26, 1995) [hereinafter OSRE, *Use of Alternative Dispute Resolution in Enforcement Actions*].

[2] *See id.*

[3] *See* Steven A. Herman, *A Fundamentally Different Superfund* Program, 12 NAT. RESOURCES & ENV'T 196, 197 (1998); *see also* OSRE, *Use of Alternative Dispute Resolution in Enforcement Actions*, *supra* note 1, at 301.

[4] 42 U.S.C. §§ 9601–9675 (1995 & Supp. III 1997).

[5] *See* U.S. ENVTL. PROTECTION AGENCY, SUPERFUND ADMINISTRATIVE IMPROVEMENTS/REFORMS 1 (1998).

[6] *See id.*

[7] There are four classes of PRPs explained in CERCLA's section 107, as follows: (1) current owners and operators: parties who own or operate a vessel or facility; (2) past owners or operators: parties who owned or operated the vessel or facility at the time of disposal; (3) parties who arranged for the disposal or transport of hazardous substances; and (4) transporters: parties who accepted hazardous substances for transport and who

and the ability of local communities to have meaningful participation in the process.[8] The cause of most of the controversy comes from CERCLA's reliance on the "polluter pays" principle, "which assigns liability to actual polluters in cleaning up the nation's hazardous waste sites while partly funding cleanups with a Hazardous Substance Superfund."[9] Parties complain that this approach causes the delays in cleanup, generates excessive transaction costs, and forces parties to spend more time and money in court.[10]

The EPA is continually announcing administrative improvements to quiet the criticisms of the Superfund program.[11] However, many problems are "beyond the scope of the EPA's statutory authority and have to be considered by Congress in reauthorizing CERCLA."[12]

The goals of the EPA reforms can be put into the following two categories: those designed to enhance enforcement fairness and reduce transaction costs, and those designed to enhance cleanup effectiveness and consistency.[13] This Note will focus on how the EPA is conducting several efforts to create a fairer, less costly, and more efficient Superfund that the EPA, parties, and the public can support.

Part II provides a general analysis of CERCLA as well as the Superfund Amendments and Reauthorization Act (SARA). This analysis outlines a background understanding of how CERCLA works to clean up hazardous waste sites throughout the United States and what opportunities for ADR exist within the current version of CERCLA. Part III discusses the use of ADR environmental actions and how they especially benefit Superfund. The Superfund Reform Act of 1994 (SRA) will be examined in Part IV in order to explain how Congress tried to use ADR theory to streamline Superfund. Part V provides a detailed discussion of the EPA reforms based on the Superfund Reform Act. This Part includes an analysis of how the EPA has increased public involvement in Superfund and how the EPA has reformed

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selected the site. *See* 42 U.S.C. § 9607(a). Any person who fits within the definition of one of these four classes may be directly liable under CERCLA. *See id.*

[8] *See* U.S. ENVTL. PROTECTION AGENCY, *supra* note 5, at 1.

[9] *See* Thomas A. Rhoads & Jason F. Shogren, *Current Issues in Superfund Amendment and Reauthorization: How Is the Clinton Administration Handling Hazardous Waste?*, 8 DUKE ENVTL. L. & POL'Y F. 245, 245–46 (1998).

[10] *See id.* at 246.

[11] *See id.*

[12] *Id.* Only small steps have been made by Congress in the reauthorization of CERCLA. In 1994, the Superfund Reform Act (SRA) was introduced but did not pass. The SRA will be discussed in greater detail below. *See infra* Part IV.

[13] *See* U.S. ENVTL. PROTECTION AGENCY, *supra* note 5, at 4–5.

enforcement in order to expedite settlement, reduce transaction costs, and keep parties out of court.

II. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

In the early development of environmental laws in the 1970s, environmental regulators used a "command and control" method to control pollution.[14] CERCLA and SARA echoed a new strategy where Congress would use civil liability to regulate pollution.[15] The civil liability approach is meant to require responsible parties to pay for response costs at the hazardous waste sites.

The CERCLA, commonly known as the Superfund law,[16] was enacted by Congress to address public health and welfare problems created by the existence of thousands of abandoned hazardous waste landfills throughout the United States. CERCLA was amended by the Superfund Amendments and Reauthorization Act[17] (SARA) in 1986 to provide a variety of improvements, including the encouragement of negotiated settlement. CERCLA, as amended by SARA, includes many opportunities for ADR to expedite settlement while reducing transaction costs.

CERCLA calls for the EPA to study and review all potential hazardous waste sites, establish a National Priority List (NPL) of cleanup sites, and develop a National Contingency Plan (NCP) creating a strategy for cleaning up hazardous waste sites.[18] Once a strategy is developed, the EPA must conduct cleanups according to the NCP and the priority of the specific site on the NPL.[19]

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[14] *See* Stephen Crable, *ADR: A Solution for Environmental Disputes*, 48 ARB. J. 24, 26 (1993). "Governmental regulators 'commanded' the level of allowable pollution in the air and water and attempted to 'control' the pollution by regulations forbidding any higher levels of pollution." *Id.*

[15] *See id.*

[16] *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 101–175, 42 U.S.C. §§ 9601–9675 (1994). CERCLA creates a fund, Superfund, "which the Environment Protection Fund can access to finance the remediation of sites that pose the highest risk." Herman, *supra* note 3, at 196.

[17] *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613 (codified in scattered sections of 42 U.S.C.); *see also* Protection of Environment, 40 C.F.R. 304.22 (1996) (requiring cleanup disputes to be submitted to an arbitration panel).

[18] *See* Protection of Environment, 40 C.F.R. § 300.210 (1996).

[19] *See id.*

Parties found liable under CERCLA or SARA are liable without fault because both CERCLA and SARA are strict liability statutes.[20] This liability is also both joint and several, and a party found to be only partially liable can be forced to pay the entire cost of cleanup.[21] CERCLA and SARA are also retroactive, thus covering any illegal activities that took place.[22]

Before the EPA begins an enforcement action at an uncontrolled hazardous waste site, the EPA searches for and identifies potentially responsible parties that may be liable under CERCLA for site cleanup.[23]

A. *Potentially Responsible Party Selection*[24]

The EPA developed a structured procedure for identifying PRPs because the PRPs for a site will often number in the hundreds.[25] Large PRP searches require intensive gathering and organizing of documents associated with site operations; therefore, contractors may conduct the PRP searches for the EPA to cut down on costs and delay.[26] Information gathered by contractors is used to identify PRPs and associate them with the type and volume of waste contributed to the site.[27] After the liability of PRPs at a site has been established, the EPA, under its "Enforcement First" policy, seeks to reach a settlement with the PRPs for the cleanup of the site.[28]

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[20] *See* Leonard F. Charla & Gregory J. Parry, *Mediation Services: Successes and Failures of Site-Specific Alternative Dispute* Resolution, 2 VILL. ENVTL. L.J. 89, 91 (1991). For an explanation of joint and several liability under CERCLA, see generally *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). For further explanation of the retroactivity of CERCLA, see generally *Olin v. United States*, 107 F.3d 1506 (11th Cir. 1996).

[21] *See* Charla & Perry, *supra* note 20, at 91.

[22] *See id.*

[23] *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 104(e), 107, 42 U.S.C. §§ 9604(e), 9607 (1994 & Supp. III 1997).

[24] *See id.* (discussing in greater detail the PRP search process). For further discussion of the PRP search process, see generally OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY, OSWER DIRECTIVE NO. 9834.03-2A, PRP SEARCH SUPPLEMENTAL GUIDANCE FOR SITES IN THE SUPERFUND REMEDIAL PROGRAM (1989) [hereinafter PRP SEARCH SUPPLEMENTAL GUIDANCE].

[25] *See generally* PRP SEARCH SUPPLEMENTAL GUIDANCE, *supra* note 24.

[26] *See generally id.*

[27] *See generally id.*

[28] *See generally id.* The "Enforcement First" policy was introduced in 1989. *See* OFFICE OF SOLID WASTE & ENFORCEMENT RESPONSE, U.S. ENVTL. PROTECTION AGENCY, OSWER DIRECTIVE NO. 9201.02A, MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM: IMPLEMENTATION PLAN (1989); Crable, *supra* note 14, at 27–28; Herman, *supra* note 3, at 196. In order to seek a settlement, the EPA must give the PRP 120 days

B. *Settlement Under CERCLA*

Congress evidenced its desire to speed up cleanups and cost recovery when provisions of SARA were enacted that described how liable parties could settle with the government.[29] Whenever possible, the EPA will attempt to reach a negotiated settlement with PRPs, through which the PRPs will conduct or finance response actions. CERCLA provides the EPA with a number of provisions to encourage settlements.[30]

SARA's settlement provisions and the courts' imposition of joint and several liability increase the incentive of PRPs to negotiate settlement agreements.[31] Other inducements to settle include escaping litigation costs, having more control over cleanup and remedial actions, avoiding increased costs caused by further deterioration at the site during delayed resolution of the claim, and avoiding bad publicity.[32]

1. *Settlement Terms*

Pursuant to CERCLA section 113(f)(1), any liable party that believes it has paid more than its fair share of response costs at a site, including a party that participated in settlement agreements, may seek contribution from other liable parties.[33] Contribution suits help to mitigate the hardships that may be imposed by joint and several liability on a party who contributes a small amount of waste to a large environmental harm. In resolving contribution claims, courts apply equitable factors[34] that they deem appropriate.

Sections 113(f)(2) and 122(h)(4) of CERCLA confer contribution protection on PRPs who resolve their liability to the United States in judicial

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to pursue settlement before beginning any cleanup at the site. The purpose of the first 60 days is to give PRPs a chance to negotiate a cleanup plan and financing proposal among themselves. The second 60 days is set aside for negotiation between the EPA and the PRPs regarding the plan and execution of the plan. *See* Crable, *supra* note 14, at 28.

[29] *See* H.R. REP. NO. 99-253(I), at 58–59 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2840–41.

[30] *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 113(f)(1)–(2), 42 U.S.C. § 9613(f)(1)–(2) (1994 & Supp. III 1997).

[31] *See* Peter F. Sexton, Comment, *Superfund Settlements: The EPA's Role*, 20 CONN. L. REV. 923, 941 (1988).

[32] *See id.*

[33] *See* 42 U.S.C. § 9613(f)(1).

[34] Most allocations are based on the following factors: the volume, toxicity and mobility of hazardous substances contributed by each party; the degree of care exercised in handling the hazardous substance; and the degree of cooperation of the parties with government officials in preventing further harm to public health or the environment.

and administrative settlements, respectively.[35] The settling PRPs are protected from contribution claims by nonsettling PRPs and others, for matters addressed in the settlement.[36] These provisions serve as an incentive to settlement.

Under CERCLA § 122(f), settlements concerning releases addressed by a remedial action may contain a covenant not to sue the settling PRP in order to encourage settlement.[37] Covenants not to sue are used when any of the following circumstances arise: the covenant not to sue is in the public interest, the covenant not to sue will expedite the response action, the settler is in compliance with the consent decree, or the response action has been approved by the EPA.[38]

2. *Settlement Tools*

Under CERCLA § 122, there are a variety of settlement tools available to the EPA including mixed funding, nonbinding allocation of responsibility (NBAR), and de minimis settlements used to encourage and expedite settlement.[39]

According to CERCLA § 122(b)(1), at any multiparty site, the EPA may be in a situation in which some PRPs are willing to settle and other PRPs are unwilling or unable to settle.[40] The settling PRPs sometimes seek the EPA's payment of a portion of the costs through the use of Superfund. These are known as "mixed funding settlements."[41]

Section 122(b)(1) gives the EPA authority to enter into mixed funding settlements. The EPA uses the following factors in evaluating mixed funding settlements: (1) the strength of the liability case against both settlers and nonsettlers; (2) the options left to the government if a settlement is not reached; (3) the size of the share to be covered by Superfund; and (4) the good faith of the settlers.[42]

There are three types of mixed funding settlements.[43] The first is a "preauthorization" in which the settling PRPs agree to conduct response

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[35] *See* 42 U.S.C. §§ 9613(f)(1), 9622(h)(4).

[36] *See id.*

[37] *See* 42 U.S.C. § 9622(f).

[38] *See id.*

[39] *See* 42 U.S.C. § 9622.

[40] *See id.* § 9622(b)(1).

[41] *Id.*

[42] *See id.*

[43] *See* Superfund Program; Mixed Funding Settlements, 53 Fed. Reg. 8279, 8279–80 (1988).

activities, the EPA agrees to finance a portion of the costs through reimbursement of settlers, and this is followed by an attempt to recover those costs from nonsettlers.[44] Second, there are "cash-out" agreements where the settling PRPs pay the EPA a portion of the response costs that the EPA uses to perform the response action.[45] Finally, the EPA can used "mixed work" in which the EPA and the settling PRPs each agree to conduct certain activities during the response action.[46]

Mixed funding settlements represent one portion of a comprehensive effort to facilitate settlements of enforcement actions under CERCLA.[47] Settlement agreements incorporating mixed funding provisions, as described in part under section 122(b) of CERCLA, offer an alternative either to immediate Superfund financing of the total costs of response actions at a site or possible delays in cleanup resulting from litigation required to force PRP action.[48]

Under CERCLA § 122(e)(3), the EPA may issue a nonbinding allocation of 100% of the responsibility if it will promote a settlement and thus reduce transaction costs.[49] NBARs are especially appropriate in certain situations. In cases that involve federal agencies, states, or municipalities as PRPs, an NBAR may be helpful in promoting settlement.[50] Additionally, in cases with a large number and variety of PRPs and de minimis parties, an NBAR may encourage settlement by creating a steering committee to represent adequately the diverse interests at the site.[51]

NBARs are not always successful in promoting settlement because there are a variety of situations where NBARs are not feasible.[52] An NBAR will not encourage settlement if "there is insufficient information available on which to base an NBAR," and "[i]n some cases it may seem that an equitable settlement can be more expeditiously or effectively achieved without the use

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[44] *Id.* at 8280.

[45] *Id.*

[46] *Id.*

[47] *See id.*

[48] *See id.*; *see also* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 122(b), 42 U.S.C. § 9622(b) (1994 & Supp. III 1997).

[49] *See* Superfund Program; Non-Binding Preliminary Allocations of Responsibility, 52 Fed. Reg. 19,919, 19,919 (1987).

[50] *See id.* at 19,920.

[51] *See id.*; *see also infra* note 68 and accompanying text for further explanation of de minimis settlements.

[52] *See* Superfund Program; Non-Binding Preliminary Allocations of Responsibility (NBAR), 52 Fed. Reg. at 19,919.

of NBAR procedures."[53] NBAR procedures are not an option if PRPs at the site are preparing for an allocation at the site.[54]

The allocation under an NBAR may be affected by the following factors: volume, toxicity, and mobility of hazardous substances; strength of the cases against individual PRPs; and PRP viability.[55] An NBAR is preliminary, and PRPs are free to adjust the percentages allocated by the EPA among themselves.[56]

At multiparty sites, some PRPs may have disposed of relatively small quantities of hazardous substances, or a landowner may not have been aware of or involved with hazardous substance activities at the facility.[57] In the interest of reaching a final settlement with such parties as promptly as possible, CERCLA authorizes special settlements with these de minimis parties.[58] Under CERCLA § 122(g), a de minimis settlement may be appropriate in the following two situations: (1) where the amount of toxicity of hazardous substances contributed by a party is minimal compared with the total amount of toxicity of hazardous substances at the site; or (2) where a party is a property owner who did not conduct or permit the generation, handling, or disposal of hazardous substances at the facility, did not contribute to the release or threatened release at the facility, and acquired the facility without knowledge that the property had been used to store, handle, or dispose of hazardous substances.[59]

PRPs and the EPA both benefit from section 122(g) de minimis contributor settlements.[60] De minimis settlements are "an effective means of achieving an early and equitable resolution of their liability with the expenditure of reduced legal fees and other transaction costs."[61] Section 122(g) gives the EPA a method to eliminate from litigation and negotiation the PRPs that have contributed only minimal amounts of waste to the site,

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[53] *Id.*

[54] *See id.*

[55] *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 122(e)(3), 42 U.S.C. § 9622(e)(3) (1994 & Supp. III 1997).

[56] *See* Superfund Program; Non-Binding Preliminary Allocations of Responsibility (NBAR), 52 Fed. Reg. at 19,919. "An NBAR is not binding on the government or the PRPs; it cannot be admitted as evidence or reviewed in any judicial proceeding, including citizen suits." *Id.*

[57] *See* 42 U.S.C. § 9622(g)(1)(A)–(B).

[58] *See id.*; *see also* Superfund Program; De Minimis Contributor Settlements, 52 Fed. Reg. 24,333, 24,333–34 (1987).

[59] *See* 42 U.S.C. § 9622(g)(1)(A)–(B).

[60] *See* Superfund Program; De Minimis Contributor Settlements, 52 Fed. Reg. at 24,334.

[61] *Id.*

thereby streamlining enforcement.[62] De minimis settlements also offer "the potential for increased numbers of voluntary settlement agreements. This is because *de minimis* contributors may be attracted by the advantages offered by Section 122(g) settlements, and non-*de minimis* parties may be encouraged to settle as a result of the revenues raised through such agreements."[63]

Mixed funding, NBARs, and de minimis settlements provide PRPs with the opportunity to reduce transaction costs, speed up the settlement process, and decrease litigation costs and delays. These settlement tools give the EPA and PRPs a chance to work together in a nonadversarial situation to determine cost allocation at a Superfund site. By working together to settle cases, the relationships between the EPA and parties will grow less antagonistic, thus making settlement and compliance easier in the future.

III. USE OF ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENTAL DISPUTES

The EPA utilizes five different ADR methods, as follows: mediation, convening, allocation, arbitration, and fact-finding.[64] Mediation is the primary ADR tool used by the EPA because it "promotes innovative solutions, cooperation among the parties and responsibility for the result by all parties."[65] In mediation a neutral third party without any authority to make decisions promotes a "voluntary negotiated settlement" between

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[62] *See id.*; *see also* 42 U.S.C. § 9622(g)(1)(A)–(B).

[63] Superfund Program; De Minimis Contributor Settlements, 52 Fed. Reg. at 24,334. The advantages to a de minimis party that settles early is contribution protection under CERCLA § 122(g)(5) and a covenant not to sue where such a covenant is consistent with the public interest under CERCLA § 122(g)(2). *See id.*; *see also* 42 U.S.C. § 9622(g)(2), (5).

[64] *See* OSRE, *Use of Alternative Dispute Resolution in Enforcement Actions*, *supra* note 1, at 301.

[65] U.S. Envtl. Protection Agency, *Alternative Dispute Resolution* (visited Feb. 16, 2000) <http://www.epa.gov/region01/steward/adr/index.html>.

> EPA Region I, New England has become a national leader in promoting the use of ADR to prevent and/or resolve environmental disputes in an effective, cost-efficient manner. [The EPA is currently employing] ADR in three general contexts: (1) settling enforcement cases; (2) promoting community . . . participation in consensus-based environmental decision-making; and, [sic] (3) preventing escalating conflicts by including ADR mechanisms in the dispute resolution provisions of settlement agreements.

Id.

disputants.[66] The second method is "convening," in which the EPA uses a third party neutral to organize disputants for negotiations and assists them in deciding whether to take advantage of ADR and in the selection of an appropriate ADR professional.[67] The EPA also uses third party neutrals to assist the parties in determining their share of responsibility at a Superfund site in a process called "allocation."[68] The EPA also uses arbitration, a more court-like decisionmaking process in which a third party hears the dispute and renders either a binding or nonbinding decision.[69] Finally, in fact-finding a third party specialized in technical disputes studies the findings at a site to aid settlement.[70]

ADR is appropriate for many EPA enforcement actions. When there are present or foreseeable obstacles to negotiation that will require great lengths of time or high costs in order to reach settlement there is an indication that ADR will help facilitate settlement at the site.[71] In most cases ADR will be successful if there are no precedent-setting issues involved and there is enough case information to substantiate violations.[72] According to the EPA's ADR liaison, Dave Batson, there are situations in which ADR may not be appropriate.[73] For example, "if parties are unwilling to negotiate," "if parties are not ready or refuse to negotiate," "if time constraints prevent successful efforts," or "if leaders and decision-makers are not included," ADR is likely to fail.[74] It is important to consider all of these scenarios before using ADR to avoid wasting time and money in unsuccessful negotiations.

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[66] *See* Office of Enforcement & Compliance Assurance, U.S. Envtl. Protection Agency, *Alternative Dispute Resolution Fact Sheet* (visited Feb. 16, 2000) <http://lles.epa.gov/oeca/osre/950500-2.html>.

[67] *See id.*

[68] *Id.*

[69] *See id.* In the case of arbitration, "a third party hears the dispute and renders a decision.... EPA may enter into binding arbitration for cost recovery claims below $500,000 under CERCLA 122(h)(2), 42 U.S.C. 9622(h)(2)." *Id.*

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See generally* Dave Batson, *ADR—Alternative Dispute Resolution* (visited Feb. 16, 1999) <http//es.epa.gov/oeca/neti/update/adrolin.html>.

[74] *Id.* According to Richard H. Mays, there are other situations where ADR is not helpful. For instance, in some cases "the conduct one of the parties is so egregious as to make it in the public interest to subject that party to the most visible trial and punishment available." Richard H. Mays, *ADR and Environmental Enforcement: Myths, Misconceptions, and Fallacies*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,099, 10,100 (Mar. 1989) [hereinafter Mays, *Myths, Misconceptions, and Fallacies*] (citing Richard H. Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or*

The Administrative Dispute Resolution Act[75] in 1990 strengthened EPA policy by encouraging the use of ADR in all federal disputes. Also, the Civil Justice Reform Act of 1990[76] authorized district court judges to require parties to attempt mediation prior to litigation.[77] A companion to these Acts, the Executive Order on Civil Justice Reform, promotes settlement and offers the use of ADR as appropriate to improve access to justice for all persons.[78]

The EPA has used ADR in negotiations arising under Superfund,[79] the Resource Conservation and Recovery Act of 1976,[80] the Emergency Planning and Right to Know Act of 1986,[81] the Clean Air Act,[82] the Federal Water Pollution Control Act (FWPCA),[83] the Federal Insecticide, Fungicide, and Rodenticide Act,[84] and the Toxic Substances Control Act.[85] Mediated negotiations have ranged from two party FWCPA cases to Superfund disputes involving upwards of 1200 parties.[86]

Alternative Dispute Resolution works especially well in the Superfund arena for a variety of reasons. First, CERCLA's strict liability and joint and several liability standards provide disincentives to litigate because there is little hope of escaping liability.[87] ADR is also quite helpful because "complex cases benefit from a third-party" neutral.[88] Superfund cases inhibit the sharing of information because joint and several liability often keeps

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a Lost Cause?, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,099, 10,099 (Mar. 1988) [hereinafter Mays, *A Noble Experiment or a Lost Cause?*]).

[75] 5 U.S.C. §§ 571–583 (1994), *amended by* Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571–584 (Supp. IV 1998). While the Administrative Dispute Resolution Act does not mandate the use of ADR, it does encourage federal agencies to consider using ADR methods prior to initiating litigation. *See id.* § 573(c). The Act does this expressly by granting authority and providing for the training of bureaucrats in dispute resolution techniques. *See id.* §§ 572(a), 573.

[76] 28 U.S.C. §§ 471–482 (1994 & Supp. II 1996).

[77] *See id.* § 473(a)(6).

[78] *See* Exec. Order No. 12,988, 3. C.F.R. 157, 157 (1997).

[79] *See generally* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (1994 & Supp. III 1997).

[80] *Id.* §§ 6901 *et seq.* (1994 & Supp. III 1997).

[81] *Id.* §§ 11,011–11,050 (1994 & Supp. III 1997).

[82] *Id.* §§ 7401–7671 (1994 & Supp. III 1997).

[83] 33 U.S.C. §§ 1251–1387 (1994 & Supp. II 1996).

[84] 7 U.S.C. §§ 121 *et seq.* (1994 & Supp. IV 1998).

[85] 15 U.S.C. §§ 2601–2629 (1994 & Supp. IV 1998).

[86] *See* OSRE, *Use of Alternative Dispute Resolution in Enforcement Actions*, *supra* note 1, at 301.

[87] *See* Sandra M. Rennie, *Kindling the Environmental ADR Flame: Use of Mediation and Arbitration in Federal Planning, Permitting, and Enforcement*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,479, 10, 480 (Nov. 1989).

[88] *Id.*

parties at odds, and third party neutrals help to facilitate the sharing of information without the threat total liability.[89] Another important reason for the success of ADR in Superfund enforcement is that technical and scientific questions are answered more easily by a neutral with experience in environmental issues.[90] The general success of ADR results from the neutral's capability to mold ADR methods to fit the complex issues that are inherent to Superfund sites.

If ADR is used at Superfund sites, parties can reach more rapid conclusions to disputes and spend less money on transaction costs like court and attorney fees.[91] Additionally, implementing ADR in enforcement negotiations benefits society by reducing the total burden on the court system.[92] One of the greatest benefits is "having tribunals or panels of experts within the parties' field make the decision on problems occurring in that field . . . ."[93] This helps to ensure that the resolution will be tailored to promote the interests of all parties.[94]

ADR is not a universal bandage to the tremendous amount of problems regarding environmental disputes; there are some disadvantages as well. There may be added costs, delays, and overstructured results caused by misapplication of techniques to disputes or problems not calling for those methods or techniques.[95] Therefore, ADR must be used carefully by experts in order to draw positive results.

The remainder of this Note will focus on the benefits of ADR to environmental enforcement in the Superfund arena. ADR is especially useful to Superfund because "CERCLA's strict liability and joint and several standards leave little opportunity to escape from liability and increase the anxiety associated with losing since the EPA typically sues only a portion of the PRPs at a site."[96] Complex cases, like those at Superfund sites, benefit from a third party neutral because "joint and several liability of the parties inherently inhibits open sharing of the information often necessary to agreement."[97] In addition, in Superfund cases there are usually present or foreseeable obstacles to negotiation which require time or resources to get

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[89] *See id.*

[90] *See id.*

[91] *See* Charla & Parry, *supra* note 20, at 90.

[92] *See id.*

[93] *Id.*

[94] *See id.*

[95] *See id.*

[96] Rennie, *supra* note 87, at 10,480.

[97] *Id.*

through in order to reach settlement. ADR can help to reduce these costs and overcome obstacles more efficiently than litigation.

ADR is beneficial to many sites where groups of PRPs work together in generator committees or steering committees to discuss and resolve problems they are facing.[98] "Allocation of liability for individual PRPs is a paramount issue for these committees. It is in this allocation process that ADR has the greatest potential."[99] The steering committee uses a "negotiation-type mechanism" that "minimizes courtroom time in the cases culminating in consent decrees."[100] In order to be most successful with the application of ADR techniques, they must be applied "on a case-by-case basis, since fact situations differ from site to site . . . ."[101]

In summary, ADR advantages the EPA in many ways. ADR can reduce transaction costs, identify all responsible parties at a site, provide relatively equitable allocation, reduce friction among the parties, enhance credibility of the steering committee, and expedite remediation.[102]

Unfortunately, neither the EPA nor the private sector has accepted ADR with open arms. Impediments on both the government and the private side ultimately are based on the lack of understanding or training in ADR.[103] In fact, "the general misunderstanding of ADR and its various procedures has been a greater impediment to the use of ADR than any valid legal or public policy objection."[104] This obstacle has lost its strength in recent years as ADR gains support throughout the legal and administrative field.

But, one must always remember, if ADR techniques are applied "inappropriately," costs may increase, trust among the parties may be lost, and controversy likely will arise, thereby causing delayed remediation.[105] Therefore, "ADR techniques need to be applied carefully and selectively [by trained professionals in order] to optimize beneficial outcomes and minimize negatives."[106]

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[98] *See* Charla & Parry, *supra* note 20, at 92. "A steering committee is simply a group of PRPs who voluntarily band together to deal with and resolve issues of common concern arising out of the site." *Id.*

[99] *Id.* Allocation will be discussed in greater detail *infra* in Part V.B.3.

[100] *Id.*

[101] *Id.* at 93.

[102] *See id.*

[103] *See* Mays, *A Noble Experiment or a Lost Cause*, *supra* note 74, at 10,090.

[104] *See* Mays, *Myths, Misconceptions, and Fallacies*, *supra* note 74, at 10,102.

[105] Charla & Parry, *supra* note 20, at 93–94.

[106] *Id.* at 94.

IV. SUPERFUND REFORM ACT OF 1994[107]

During the 103d Congress, a new outlook for CERCLA was proposed in the Superfund Reform Act of 1994 (sometimes referred to herein as "the Act"). The SRA was an attempt to increase efficiency in the enforcement of CERCLA. It developed important strategies to promote community participation and the protection of human health.[108] The SRA also established a liability allocation procedure "with the hope of encouraging settlements and reducing transaction costs."[109] These new approaches were designed to streamline the Superfund process and to allow responsible parties to settle for their "share" of liability.[110]

A. *Community Participation*

Congress outlined the new policy of community participation in section 101 of the SRA. There were grants set aside for technical assistance[111] and provisions to improve citizen and community participation in the Superfund decisionmaking process.[112] The SRA set up "community working groups" to provide information relating to "facility remediation, including health studies, potential remedial alternatives, and selection and implementation of remedial and removal actions."[113] These provisions were established to promote citizen cooperation in the Superfund decisionmaking process. By involving citizens in the Superfund process, Congress expressed a desire to increase public awareness of the health and environmental threats at Superfund sites and ultimately to gain much needed public support.

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[107] H.R. 3800, 103d Cong. (1994). The Superfund Reform Act of 1994 also was introduced in the Senate as S. 1834, 103d Cong. (1994).

[108] *See* H.R. 3800 §§ 101–112.

[109] David L. Markell, *"Reinventing Government": A Conceptual Framework for Evaluating the Proposed Superfund Reform Act of 1994's Approach to Intergovernmental Relations*, 24 ENVTL. L. 1055, 1070 (1994). The SRA gives the EPA authority to manage the allocation of costs among PRPs. *See id.* The process has six simple steps, as follows: (1) the EPA finds the PRPs responsible at the site; (2) a "neutral allocator" is designated; (3) an allocation process is conducted in which parties either can represent themselves orally or in writing; (4) a draft report is issued by the allocator creating nonbinding equitable allocations of costs of the PRPs; (5) the parties can comment on the report; and (6) a final report is issued reporting shares of responsibility. *See id.*

[110] *See* H.R. 3800 §§ 101–112.

[111] *See id.* § 101(e).

[112] *See id.* § 101(f).

[113] *Id.* § 102(g)(2).

B. *Allocation Procedures*

Congress presented the new policy of allocation in section 409 of the SRA.[114] The SRA began by examining the scope of the allocation procedures at multi-party facilities.[115] It laid out a detailed description of the commencement of allocation, including procedures for the responsible party search, the notification of de minimis parties, and the preliminary notice to other parties.[116]

Congress explained a new procedure for cost allocation at Superfund sites.[117] According to the Act, following the issuance of the final list of allocation parties, an allocator "shall initiate and conduct an allocation process that shall culminate in the issuance of a written report, with a non-binding, equitable allocation of the percentage shares of responsibility of all allocation parties . . . for the facility, and provide such report to the allocation parties and the Administrator."[118]

The allocation of percentage shares for the facility should be based on the following factors: (1) the "amount of hazardous substances contributed by each . . . party"; (2) the "degree of toxicity of hazardous substances contributed by each . . . party"; (3) the "mobility of hazardous substances contributed by each . . . party"; (4) the "degree of involvement of each . . . party in generation, transportation, treatment, storage, or disposal"; (5) the "degree of care exercised by each . . . party"; (6) the "cooperation of each . . . party in contributing to the response action and in providing timely information during the allocation process"; and (7) any other facts that the EPA Administrator thinks are necessary and consistent with published EPA guidelines.[119]

The Act also discussed the other important factors of the allocation process. There was an explanation of how parties should respond to the allocator's information requests,[120] the civil and criminal penalties under the Act,[121] and the confidentiality of all documents and materials submitted to the allocator.[122]

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[114] H.R. 4916, 103d Cong. § 409 (1994).

[115] *See id.* § 130(a)(1)–(7).

[116] *See id.* § 130(c)(1)–(6).

[117] *See id.* § 130(g), (h).

[118] *Id.* § 130(h)(1).

[119] *Id.* § 130(h)(2)(A)–(G).

[120] *See id.* § 130(i).

[121] *See id.* § 130(j).

[122] *See id.* § 130(k).

Neither PRPs nor the United States would have been bound by the allocation report.[123] Under the SRA, however, the United States would have been required to accept a timely offer of settlement from a party based on its allocated percentage share, if the offer included "appropriate premia and other terms and conditions of settlement" and if the EPA and the DOJ did not determine that "a settlement based on the allocator's determinations would not [have been] fair, reasonable, and in the public interest."[124] If the EPA and the DOJ were to reject the allocation, the determination would not have been judicially reviewable.[125]

V. EPA REFORMS BASED ON THE SUPERFUND REFORM ACT OF 1994

The EPA reform initiatives to increase public participation and streamline Superfund discussed in this Part are patterned after concepts from proposals introduced during the 103d Congress.[126] The pilot programs initiated by the EPA stress enforcement, economic redevelopment, public outreach in decisionmaking, environmental justice,[127] and state and tribal empowerment.[128] The response from interested parties to the intent of the initiatives was generally positive.[129]

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[123] *See generally* S. 1068–1070, 103d Cong. (1994).

[124] *See generally id.*

[125] *See generally id.*

[126] *See Superfund: Regional Officials Asked to Evaluate EPA's Proposed Administrative Initiative*, 25 Env't Rep. (BNA) 2034, 2034–36 (Feb. 24, 1995) [hereinafter *Regional Officials Asked to Evaluate EPA's Proposed Administrative Initiatives*]. The SRA received broad support but it failed to pass. *See id.*

[127] On February 11, 1994, President Clinton issued Executive Order 12,898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, as well as an accompanying Presidential Memorandum, to focus federal attention on the environmental and human health conditions in minority and low-income communites. *See* Exec. Order No. 12,898, 3 C.F.R. 859, 859–61 (1995); *see also* William J. Clinton, *Memorandum on Environmental Justice* (Feb. 11, 1994), *in* 1 PUB. PAPERS 241, 241–42. The strategy to ameliorate this problem identifies and addresses disproportionately high and adverse human health or environmental effects of any federal agency's programs, policies, and activities on minority and low-income populations. *See* Clinton, *supra*, at 241.

[128] *See Regional Officials Asked to Evaluate EPA's Proposed Administrative Initiatives*, *supra* note 126, at 2034.

[129] *See id.* The first course was held in June 1993, the second in February 1995, and the third in October 1995. The reforms focused on the following areas: clean ups, enforcement, risk assessment, public participation and environmental justice, economic redevelopment, innovative technology, and state and tribal empowerment. *See* 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 1–4.

A. *Reforms to Increase Public Involvement*

The EPA has created a program that implements innovative ADR techniques to reform the Superfund program to reduce litigation, limit attorney's fees, and increase community participation in the toxic waste cleanup process. If successful, these reforms will streamline Superfund to a point where little contention exists between the EPA, the parties, and the public.

1. *Pilot Community-Based Remedy Selection and Community Advisory Groups*

Pilot Community-Based Remedy Selection "is based on the theory that consensus-based approaches to remedy selection, and collaborative partnerships involving community stakeholders, can lead to remedies that better satisfy the community, while still meeting statutory and regulatory requirements."[130] The EPA hopes this initiative will further the development of community participation.[131]

In order to motivate communities to become part of the clean-up process, the EPA developed community advisory groups (CAGs).[132] CAG participants represent diverse interests and provide "a public forum to consider cleanup-related issues and to work with EPA to address community needs and concerns with respect to the response."[133] The EPA wants to develop a close relationship with the CAG in the hope that the community will affect the site cleanup settlements positively.[134]

There has been overall success to date regarding the Remedy Selection program. Assistance from the residents in the settlement at the Lower East Fork Poplar Creek Site in Oak Ridge, Tennessee "resulted in estimated future cost reductions (cleanup savings) of $160 million."[135] From the Manhattan project of World War II through the Cold War era, large volumes of mercury were released continuously into a creek from the production of nuclear

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[130] 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 50.

[131] *See id.*

[132] *See id.* CAGs are an outgrowth of the Community Working Groups (CWGs) proposed in § 103 of the Superfund Reform Act. *See* S. 1060–1061, 103d Cong. § 103 (1994). There Congress created CWGs to serve as an information clearinghouse for the community and as an advisory group to the EPA, particularly for the purpose of determining the reasonably anticipated future use of land at the facility. *See id.*

[133] *See* OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 50.

[134] *See id.*

[135] *See id.*

weapons at the Oak Ridge facilities.[136] The EPA, the U.S. Department of Energy (DOE), and the Tennessee Department of Environment and Conservation included the public by providing presentations to community groups in Oak Ridge and surrounding communities.[137] While creating a workplan for the Site, DOE accepted comments from a citizen working group, and this group's pressure managed to raise the cleanup goal from 180 parts per million (ppm) to the 400ppm level.[138] "The change in the cleanup goal to conform to public opinion reflects the community's voice in the remedy selection process and the government's responsiveness to citizen participation."[139] Community involvement has been an important settlement factor at other sites including Jasper County, Missouri[140] and Leadville, Colorado.[141] Although the circumstances and methods varied at each of these sites, the outcomes were enhanced because the public felt included.[142]

Comments from CAG participants, EPA staff, and state and local government staff involved in cleanup actions have stressed the incredible success of CAGs.[143] For example, at the Allied Paper, Inc. Site in Portage Creek, Michigan, state officials and citizens worked together in a CAG to ease public involvement by keeping citizens aware of progress at the Site.[144]

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[136] *See* U.S. Envtl. Protection Agency, *Region 4: Elements of Success at Lower East Fork Poplar Creek Site, Regional Success Stories* (visited Feb. 16, 1999) <http://www.epa.gov/swerffrr/reg_suc.htm>.

[137] *See id.*

[138] *See id.*

[139] *Id.*

[140] *See* 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 50. In Jasper County, Missouri, at the Oronogo-Duenweg Site, because of a partnership between the CAG and the remedial project manager, a grant was given to the community in order "to develop an environmental master plan which served as the basis for the institutional controls adopted as part of the site remedy." *Id.*

[141] *See id.* In Leadville, Colorado, at the California Gulch Site, the EPA calmed angry citizens by taking time to listen to the community and to create "mutually acceptable solutions." *Id.*

[142] *See id.*

[143] *See id.* at 70.

[144] *See id.* There are several similar CAG success stories. *See generally id.* According to the EPA Office of Solid Waste and Emergency Response's Annual Report for 1998, "the CAG concept has been so successful that other Agency programs (Community-Based Environmental Protection, the Resource Conservation and Recovery Act, and Project XL) adopted its ideas in fiscal year 1998." 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 22. In addition, the EPA has distributed a CAG toolkit to guide communities in creating a CAG. *See id.*

After analyzing various case studies, the EPA collaborated the following advice and concerns, important to communities that may form a CAG: (1) "CAGs should be formed as early as possible"; (2) "[t]he community must take the initiative in CAG formation and operation"; (3) "CAGs must be inclusive and independent"; (4) "[a]ccess to good technical expertise is important"; (5) "[t]he CAG must recognize what is possible and work within those limits"; (6) "CAG leaders must be 'in it' for the long haul"; (7) "CAGs are more effective than public meetings"; (8) "[t]he need for additional resources is a common concern"; (9) "CAGs can give the community more influence in site-related decisions"; and, (10) "CAGs can speed up the process."[145]

The Pilot Community-Based Remedy Selection and Community Advisory Groups are good examples of how using innovative ADR techniques that involve the community in the settlement process can help to increase awareness among Superfund response personnel of their responsibility to work with citizens affected by the cleanup and the importance of including community values and concerns in response decisionmaking.

2. *Community Involvement in the Enforcement Process*

In order to strengthen the Superfund reforms effort, actions have been taken to include communities in the enforcement process. Pilot sites were developed where the community took an active role in creating workplans and frequently received information about progress at the site.[146] These pilots have helped the EPA to understand that "communities who regularly attend technical meetings are more informed and, therefore, better able to understand the progress of response activities" and that "a greater degree of community involvement may result in time and resource savings in the long run."[147]

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[145] 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 70.

[146] *See id.* at 73.

[147] *Id.*

3. *Superfund Ombudsperson in Every Region*[148]

The ombudsperson in every region provides the public with a local representative who is familiar with the situation at the site and who is capable of facilitating stakeholder concerns.[149] An ombudsperson is "an official, appointed by an institution, whose job is to investigate complaints and either prevent disputes or facilitate their resolution within that institution."[150] The Superfund Regional Ombudsperson (RO) is responsible for "resolving concerns and providing information and guidance" and can assist "staff members to settle or prevent problems with stakeholders."[151] The ROs have been able to provide quick answers to health-related questions from concerned citizens by responding directly to stakeholders when possible.[152]

The Superfund Regional Ombudsperson has been a unanimous success throughout the regions. For example, the RO at the Rayioner Pulp Mill in Port Angeles, Washington eased the community by providing information to the stakeholders about the closure of the mill and landfill sites used to dispose of mill wastes.[153] A site team with a community involvement coordinator now works closely with interested parties in order to maintain a positive outcome at the site.[154]

The Superfund Regional Ombudsperson has helped to increase the overall rating with stakeholders and make the Superfund program more responsive to the community.

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[148] The U.S. Environmental Protection Agency is divided into 10 regional offices, as follows: Region I, in Boston, Massachusetts; Region II, in New York, New York; Region III, in Philadelphia, Pennsylvania; Region IV, in Atlanta, Georgia; Region V, in Chicago, Illinois; Region VI, in Dallas, Texas; Region VII, in Kansas City, Kansas; Region VIII, in Denver, Colorado, Region IX, in San Francisco, California; and Region X, in Seattle, Washington. *See* U.S. Envtl. Protection Agency, *Regions* (visited Feb. 26, 2000) <http://www.epa.gov/epahome/ locate2.htm>.

[149] *See* 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 51.

[150] LEONARD L. RISKIN, DISPUTE RESOLUTION AND LAWYERS 4 (1987).

[151] *See* 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 51.

[152] *See id.*

[153] *See id.* at 51–52.

[154] *See id.* at 52. The success of ROs has been legion. *See id.*

B. *Enforcement Reforms*

1. *Potentially Responsible Party Search Pilots*

The primary goals of the PRP search pilots are to improve the quality and timeliness of searches for potentially responsible parties and make information more accessible.[155] The EPA also planned to identify and offer small parties expedited settlements prior to the selection of the remedy at pilot sites in order to remove the small contributors or de minimis[156]parties from Superfund enforcement activities much earlier than with the traditional process.[157]

In 1995, sites were identified in order to analyze whether the SRA could be accomplished by using early PRP searches and one or more streamlining techniques.[158] The pilot sites were created to meet "a time frame that would lead to notification of potential *de minimis* parties within twelve months after the search start and notification of all other parties within eighteen months after the search start."[159]

After analyzing the pilot program, the EPA found the streamlining techniques favorable to the improvement of PRP searches on the whole. For example, the model information request letter helped to identify "150 additional parties early in the search process."[160] In addition, early interviews helped solicit important details about other parties and provided a clear picture of the history of the site.[161] Also, a publicly available repository for PRP search information provided PRPs and local community groups with

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[155] *See Superfund: Hundreds of Small Parties Released from Enforcement Under Agency Reforms*, 26 Env't Rep. (BNA) 2196, 2196–97 (Mar. 22, 1996) [hereinafter *Hundreds of Small Parties Released from Enforcement*].

[156] *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 122(g)(1)(A)–(B), 42 U.S.C. § 9622(g)(1)(A)–(B) (1994); *see also infra* Part III.B.2 for a discussion of settlement tools for use in environmental disputes.

[157] *See Hundreds of Small Parties Released from Enforcement*, *supra* note 155, at 2196–97.

[158] *See* 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 55. The piloted streamlining techniques used at these sites were as follows: "radio announcements, newspaper advertising, and toll free telephone numbers . . . ; conducting early interviews of parties to obtain information and minimize the need for multiple rounds of information requests; and establishing a publicly available repository for PRP Search information, to assist PRPs in identifying other PRPs earlier in the enforcement process." *Id.*

[159] *Id.*

[160] *Id.*

[161] *See id.*

information and could lead "to the nomination of additional parties earlier in the search process."[162]

The search pilots provided the EPA with important conclusions about the Superfund reforms. For example, by studying the results of these pilots, the EPA realized that SRA notification time frames would not be feasible. In addition, the EPA learned that "complex sites, troublesome hazardous substances, and uncooperative PRPs" lead to the most obstacles in adherence to the SRA time frames.[163]

2. *Expedited Settlement Pilots*

In 1995, expedited settlement reforms were implemented "to reduce transaction costs for all potentially responsible parties . . . at Superfund sites through early settlements."[164] These pilots were successful in bringing parties to the table earlier in the cleanup process, resulting in early de minimis settlements, ability to pay settlements with de minimis PRPs who are unable to pay their full share, and the nomination of more PRPs earlier in the process.[165]

De minimis liability relief would provide "greater efficiency in allocating responsibility under CERCLA" and "reduce some of the private party litigation."[166] De minimis settlements will eliminate "parties that have contributed very small amounts of pollution [or] are very small themselves."[167] The benefits of early settlement with de minimis parties include lower transaction costs due to a more efficient allocation of

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[162] *Id.*

[163] 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 59.

[164] 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 57.

[165] *See id.* Expedited settlements first were proposed in section 408 of the SRA. *See* S. 1068, 103d Cong. § 408 (1994). There Congress authorized and encouraged the President to offer expedited settlements to the following three categories of PRPs: (1) de minimis parties; (2) generators and transporters of municipal solid waste and sewage sludge; and (3) small businesses or municipalities which have demonstrated a limited ability to pay. *See id.*

[166] Rhoads & Shogren, *supra* note 9, at 257. The 1998 Superfund Annual Report recorded that the "EPA had settled with a total of 1,402 *de minimis* and ATP [ability to pay] parties, resulting in the recovery of approximately $22.7 million." 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 50.

[167] *See* Rhoads & Shogren, *supra* note 9, at 257.

contribution shares and the creation of funds that can be used to encourage other PRPs to settle.[168]

There are a variety of factors that the EPA acknowledged to have been helpful to the success of expedited settlements. First, beginning work at the sites early in the cleanup process will result in identification of and suitable plans for the de minimis PRPs.[169] Secondly, the region should concentrate on gathering data about the history of the site and the "identity and contributions of each PRP."[170] Lastly, it is valuable to help establish the basis for a de minimis settlement with credible and accurate information on the costs of likely future response actions.[171]

3. *The Allocation Pilots*

While the SRA was never passed, the proposed allocation process became the model for the EPA's ongoing "allocation pilot" program.[172] Under what can be called "an alternative dispute resolution technique based on an arbitration-like process,"[173] the EPA plans to "reduce transaction costs of liable parties and improve the efficiency and fairness of the system."[174]

Twelve sites were chosen in 1995 to implement the Allocation Pilots, "offering a fundamentally different approach to allocating Superfund costs between parties."[175] First, the parties select a neutral or "allocator" to conduct a "non-binding out of court process resulting in an allocation report where each allocation party is assigned a share of responsibility."[176] After the "share of responsibility" is calculated, the parties may "offer to settle with

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[168] *See id*; *see also* 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 50.

[169] *See* 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 50.

[170] *Id.*

[171] *See id.*

[172] *See id.* at 52. These allocation procedures rely on those introduced in section 409 of the SRA. *See id.* at 48, 52; *see also* H.R. 4916, 103d Cong. § 409 (1994).

[173] Rhoads & Shogren, *supra* note 9, at 256.

[174] *Superfund: Five Sites Chosen by Agency to Test Liability Allocation Based on Reform Bill*, 26 Envt. Rep. (BNA) 251, 251 (May 26, 1995).

[175] 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 58.

[176] *Id.* Consistent with the SRA, the allocator will base the allocation upon the following factors: the volume, toxicity, and mobility of hazardous substances contributed by each allocation party; each party's respective degree of involvement with disposal; the degree of care exercised with respect to the hazardous substances; and the degree of cooperation in contributing to the response action and providing information during the allocation process. *See id*; *see also* 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 48.

the EPA based on their allocated share."[177] If there are allocation parties that are now out of business and have no funds, the EPA will pay 100% of this "orphan share."[178]

a. *The Nomination Process at Pilot Sites*

The allocation pilot process gave PRPs the opportunity to suggest the inclusion on the PRP list of any other parties "whose potential liability could be justified by supporting documentation."[179] This was a valuable opportunity for PRPs to identify additional allocation parties who could be assigned shares by the allocator.[180] To discourage PRPs from making frivolous nominations, the EPA tested a fee-shifting provision where a PRP who nominated another PRP would pay the costs incurred by that party if the nominee was assigned a zero share by the allocator.[181]

b. *Selecting the Allocator and the Allocator's Role*

To select the allocator, the parties interview candidates from the EPA's pool and then reach "a consensus agreement on the best person for that site" with the help of a neutral "convenor."[182] The EPA has solicited the nomination of nongovernmental allocators to become a part of this pool.[183] By giving the parties discretion in choosing the allocator, this new allocation process relieves the problem of participants perceiving the allocator as

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[177] 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 58.

[178] *Id.* An orphan share is a portion of cleanup costs that cannot be assessed to a PRP as a result either of the PRP's insolvency or the EPA's inability to identify the PRP. *See id.*

[179] *See* 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 52.

[180] *See id.*

[181] *See id.* at 52, 54. The EPA reports that private parties were unhappy with fee-shifting because the process was so burdensome; therefore, the nominating parties withdrew the nominated parties that the EPA found not liable. *See id* at 54.

[182] 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 58.

[183] *See supra* note 176 and accompanying text. The National Arbitration Association also collaborates a list of members of the National Panel of Environmental Arbitrators. *See* Kenneth P. Cohen, *Allocation of Superfund Cleanup Costs Among Potentially Responsible Parties: The Role of Binding Arbitration*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,158, 10,162 (May 1988).

something other than entirely neutral.[184] If the parties trust the allocator as neutral, they will be more likely to accept the allocation results.[185] The parties are more likely to trust the allocator if the allocator is experienced with arbitration in related areas.[186] At most of the pilots, the parties were interested in an allocator "who could act as both a mediator and allocator because they believed there would be attempts to settle the matter before or during the allocation."[187]

The meetings with the allocator were beneficial to the parties because the parties were able to participate in every stage of the process and remain involved in decisionmaking.[188] This involvement gave the parties more confidence in the allocator, resulting in more satisfaction with the outcome. Some parties did complain that the allocators lacked important site-specific information to create fair allocations, but, for the most part, the use of neutrals facilitates settlements and solves disputes between PRPs.[189]

c. *Need for Protocol Document*

The allocation process should include key protocol, especially various factors that may impact the transaction costs of allocation.[190] After analyzing the pilot results, the EPA realized that a "basic confidentiality agreement" and "litigation tolling agreement" alone were insufficient.[191] As evidenced by the pilots, there is a definite need for protocol documents to contain detailed procedures, including mandated time frames, to save time.[192]

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[184] *See* Steven M. Jawetz, *The Superfund Reform Act of 1994: Success or Failure Is Within EPA's Sole Discretion*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,161, 10,168 (Apr. 1994).

[185] *See id.*

[186] *See* Cohen, *supra* note 183, at 10,162.

[187] *See* 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 54–55. In this case the neutral would contribute mediation skills during settlement and allocation skills later when issuing the allocation report. *See id.*

[188] *See id.*

[189] *See id.*

[190] *See* Rhoads & Shogren, *supra* note 9, at 257. Rhoads and Shogren suggest that protocol documents should contain "factors such as the inclusion of a neutral, third-party allocator, mandated time frames, and permissibility of nomination of PRP's [sic] by other responsible parties." *Id.*

[191] *See* 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 58. A litigation tolling agreement is necessary so that no party will sue each other during the allocation process. *See id.*

[192] *See id.*; *see also* Rhoads & Shogren, *supra* note 9, at 257.

d. *Results of the Allocation Pilot Program*

As a result of the allocation pilots, the EPA has collected valuable information about what improvements are necessary in order to streamline superfund successfully in the future. The EPA found that at most of the sites, settlement negotiations with the government were requested before the allocation process was completed, providing earlier site cleanup and more certainty as to the PRP's cost share. [193] There were consequences as well to settlement negotiations during the allocation process. The allocation process was put on hold in many cases, sometimes delaying reports for several months, thus increasing transaction costs.[194]

The results of the allocation pilot program have been mixed. "Several parties thought the share assigned to them in settlement was fair considering the level of information available, but others felt that their share was not fair, believing that major corporations with greater resources were better able to influence the allocator and/or the Agency."[195] The process seemed more cost effective for larger companies because the costs were less than litigation, but small businesses found transaction costs to be high because they felt forced to participate in order to protect their interests.[196] But, the general consensus from the parties was that "flexibility in an allocation process must exist in meeting deadlines . . . to address site-specific conditions."[197]

The EPA also has realized some important downfalls of the allocation pilot program. For instance, the EPA found it hard "to translate a shares agreement or allocation report into a judicial settlement"; thus, the consent decrees at the sites had to be tailored individually to address each party's interests. [198] It also was trying for the EPA to convert individual shares into a workplan for the site because "parties only wanted to be responsible for their individual share."[199] Since allocation schemes require 100% settlement before the process can be completed, it is impossible to settle before there is

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[193] *See* 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 55.

[194] *See id.* at 55–56.

[195] *See* 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 59.

[196] *See id.*

[197] *Id.*

[198] *Id.* at 60.

[199] 1998 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 58.

100% settlement.[200] This lengthens the allocation process and impedes cleanup.[201]

Despite the downfalls mentioned above, the allocation does have some distinct advantages. Most notably, settlements avoid litigation and are expected to occur in a relatively short period of time and at a lower cost than those settlements achieved under the current law.[202] At the Tulalip Landfill Site in Marysville, Washington, three Consent Decrees were signed with the majority of the allocation parties at the Site.[203] The Tulalip Landfill Site on the Tulalip Indian Reservation is surrounded by three water bodies that flow into northern Puget Sound.[204] The Puget Sound is a federally designated national estuary because salmon and shellfish flourish and threatened species inhabit the Sound.[205] The land was leased by the Tulalip Tribe to the Seattle Disposal Company to store municipal, industrial, and hospital waste from Seattle.[206] In order to dispose of the waste, the former wetland was filled and canals were used to barge in waste from Seattle.[207] An inspection of the site in February 1988 exposed elevated levels of heavy metals, volatiles, semivolatiles, and PCB in the ground water and wetland water.[208] The EPA immediately was concerned by the level of toxins in the water because wells within four miles of the site support almost 8,000 people.[209]

The settlement at the Tulalip Site was completed quickly and with lower costs. At Tulalip, "one group of parties . . . perform[ed] the response action, and two separate groups of parties . . . provide[d] funding for the cleanup."[210] The parties performing response action are using money from preallocation de minimis settlements to fund cleanup, and this money reduces the settling parties' respective responsibility.[211]

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200 *See id.*

201 *See id.*

202 *See* Rhoads & Shogren, *supra* note 9, at 257.

203 *See* U.S. Envtl. Protection Agency, *NPL Site Narrative at Listing* (visited Feb. 16, 2000) <http://www.epa.gov/oerrpage/superfund/sites/npl/nar1318.html>.

204 *See id.*

205 *See id.*

206 *See id.*

207 *See id.* From 1964–1979 almost 4 million cubic yards of waste were deposited at the site. *See id.*

208 *See id.*

209 *See id.*

210 1997 OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY ANN. REP. 60.

211 *See id.*

e. *How to Increase Acceptance of Allocation Process?*

One of the problems with acceptance of the allocation process is lack of consensus regarding those factors that should be considered when allocating costs. The allocation of response costs at Superfund sites is a "contentious and unsettled" issue due to the lack of statutory direction on allocation.[212] CERCLA fails to develop an approach for allocating this liability among the various PRPs.[213] However, it is known that allocation is equitable and that all of the factors that are ignored at the liability phase are fair game as allocation factors.[214] As explained above, PRPs may work together to craft an allocation with or without a neutral allocator, or parties may take their disputes to courts or arbitration.[215] Allocation of Superfund cleanup costs has been assigned by statute to the courts, which "may allocate response costs among the liable parties using such equitable factors as the court determines are appropriate."[216] But, this is as far as the statute goes, so courts and allocators have been left to determine what equitable means and factors are appropriate in developing equitable allocations of response costs.

This process is quite intensive and often fact- and site-specific.[217] The Gore factors, a set of six factors delineated in the unsuccessful amendment to CERCLA proposed by then-Representative Albert Gore, provide a starting point for determining equitable factors.[218] The Gore factors are as follows: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of hazardous waste can be distinguished; (2) the amount of the hazardous waste involved;[219] (3) the degree of toxicity of

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[212] Richard Lane White & John C. Butler III, *Applying Cost Causation Principles in Superfund Allocation Cases*, 28 Envtl. L. Rep. (Envtl. L. Inst.) 10,067, 10,067 (Feb. 1998).

[213] *See id.*

[214] *See id.*

[215] *See id.*

[216] Comprehensive Environmental Response, Compensation, and Liability Act § 113(f)(1), 42 U.S.C. § 9613(c)(1) (1994).

[217] *See* White & Butler, *supra* note 212, at 10,070.

[218] *See* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989) (applying the Gore factors). A number of cases have applied these factors, including *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 575 (6th Cir. 1991); *United States v. Tyson*, No. 84-2663, 1989 WL 159256, at *10 (E.D. Pa. 1986); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1487 (D. Colo. 1985); and *United States v. A&F Materials Co.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). For a discussion of these factors, see John C. Butler III et al., *Allocating Superfund Costs: Cleaning up the Controversy*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,133, 10,135 (Mar. 1993).

[219] The volume of materials contributed to the site by each party is an important part of allocating costs, but one must be aware that even "[a] small quantity of material may

the hazardous waste involved;[220] (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with federal, state, or local officials to prevent any harm to the public health or the environment.

As courts previously have noted, the Gore factors are not exhaustive,[221] and courts have discretion to use whatever factors they want.[222] For example, as exemplified by the Allocation Pilots discussed above, criteria that resemble the Gore factors have been proposed for use in this program.[223] The EPA used its discretion and has left out the first factor; therefore, parties' ability to pay is not considered when determining allocation of costs in the pilot program.[224]

The focus of allocation should be site-specific and party-specific issues because allocation is a zero-sum game.[225] Superfund practitioners need a clearly articulated allocation principle in order to litigate an allocation case successfully or to engage in a multiparty settlement process.[226] A consensus on allocation criteria will be helpful to parties involved in allocation settlements and eventually will provide guidance to all parties, either in settlement negotiations or litigation. The creation of a standard list of criteria to consider in allocations may resolve some of the fairness issues that have occurred in the Allocation Pilot Program.

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have caused proportionately more damages than a larger quantity of a different material." Cohen, *supra* note 183, at 10,158.

220 The "mobility, persistence, and other properties" of the material shall be examined. *Id.*

221 *See* Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992) ("The Gore factors are neither an exhaustive nor an exclusive list.").

222 *See id.* ("A court may consider several factors, a few factors, or only one determining factor . . . depending on the totality of circumstances presented to the court.").

223 *See supra*, note 176 and accompanying text.

224 *See supra* note 176 and accompanying text.

225 *See* White & Butler, *supra* note 212; *see also* LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 33–38 (1994). Zero-sum disputes are those in which "one person's gain necessarily means an equivalent loss for the other side" and in which "the gains and the losses of the bargainers exactly offset each other; that is, they add up to zero." *Id.* at 33.

226 *See* David G. Mandelbaum, *Toward a Superfund Cost Allocation Principle*, 3 ENVTL. LAW. 117, 120 (1996). Mandelbaum discusses the need for cost allocation guidelines in order for successful settlement negotiations.

VI. CONCLUSION

The role of ADR between the government and responsible parties in CERCLA settlements is evolving. SARA has paved the way for ambitious environmental lawyers and policy makers to infiltrate alternative dispute resolution into the realm of Superfund cleanup. There are thousands of Superfund sites located across the United States that affect public health and safety and threaten the health of our natural environment. It is necessary that PRPs and the government begin to expedite the cleanup of these sites before it is too late to protect the public and to protect valuable natural resources.

It seems obvious that those most affected by Superfund sites, the public living near the sites, should be involved in the settlement process. By involving the public in the actions taken at these sites, there will be less delay and tension. If the public plays a role in the siting, use, and cleanup of hazardous waste sites, there is more hope for compliance with environmental regulations and therefore less controversy in the future. Environmental disputes in the past have forgotten about those who have to breathe the air and drink the water every day. The Superfund Reform Act of 1994 gave the public an opportunity to participate in their own fate.

Even though this legislation did not pass, its central focus echoes in the EPA's current strategy to improve Superfund. By emphasizing methods of public participation and ADR, the new Superfund will provide parties with a fairer allocation process and lower transaction costs. The public will have the opportunity to provide more input into the entire Superfund process. In addition, the government will have lower transaction costs, better compliance rates from parties, and most importantly, better relationships with the public and the parties. ADR helps the EPA develop more successful and ongoing relationships with the public and the parties, thus developing a more streamlined and efficient Superfund.